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Supreme Court, U.S.
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No. 05-607 SEP 7 2005

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

JASON RHOADES; MICHAEL DOWNING; JOHN BORNSCHEIN, on behalf of themselves and all others similarly situated,

Petitioners,

Against

BARBARA QUEEN-JOHNSON, a member of the Parole Board, et. al.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Jason Rhoades, *In Pro Se*
13985 South 42nd Street
Fulton, MI 49052

Michael Downing, *In Pro Se*
#206609
38 Fourth Street Coldwater, MI 49036-8607

John Bornschein, *In Pro Se*
P.O. Box 1111
Traverse City, MI 49864-1111
231-632-0835

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QUESTIONS PRESENTED

1) Whether current Michigan statutes create a liberty interest in parole which vests in those prisoners who score high on the Michigan parole guidelines?

2) Whether Michigan parole board members engage in decision making which has the chacteristic attributes of a judicial proceeding which may entitle them to absolute quasi-judicial immunity?

PARTIES

The petitioners are Jason Rhoades,[1] a state prisoner who is currently on parole; Michael Downing, a state prisoner at Florence Crane Correctional Facility in Coldwater, Michigan; and John Bornschein[2] a state prisoner at Straits Correctional Facility in Kincheloe, Michigan.

The respondents are Barbara Queen-Johnson, James Bartholomew, Adrian Green, George Lellis, Margie McNutt, Al Slaughter, William Reed, and Stephen Marschke, who are past members of the Michigan Parole Board; John Rubitschun, Miguel Barrios, Charles Braddock, and Marianne Samper, who are current members of the Michigan Parole Board; William Martin, and William Overton, who are past directors of the Michigan Department of Corrections; and Patricia Caruso, who is the current Director of the Michigan Department of Corrections.

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1. As a condition of Mr. Rhoades parole, respondents have prohibited him from having any contact with the other petitioners and, therefore, he was prevented from signing this petition.

2. Mr. Bornschein was discharged from his sentence on October 22, 2005, and now resides in Traverse City, Michigan.

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DECISIONS BELOW

The decision of the United "States Court of Appeals for the Sixth Circuit is unreported and a copy is attached as Appendix A to this Petition (A.1). The Order of the United States District Court for the Western District of Michigan is not reported. A copy is attached as Appendix C to this Petition (C.1). The decisions of respondents are attached as Appendix D (D.1).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 3, 2005. An Order denying a petition for rehearing was entered on June 8, 2005, and a copy of that order is attached as Appendix B to this petition (B.1). Jurisdiction is conferred on the Supreme Court by 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment XIV to the United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

The Amendment is enforced by Title 42, Section 1983, of the United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State, Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively tot he District of Columbia shall be considered to be a statute of the District of Columbia.

The Michigan statutes involved in this case include Michigan Compiled Law, Section 791.233e(1), which provides:

> Sec. 33e. (1) The department shall develop parole guidelines that are consistent with section 33(1)(a) and that shall govern the exercise of the parole board's discretion pursuant to sections 34 and 35 as to the release of prisoners on parole under this act. The purpose of the parole guidelines shall be to assist the parole board in making release decisions that enhance the public safety.

Michigan Compiled Law, section 791.233e(5), which provides:

> (5) The department shall promulgate rules pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, which shall prescribe the parole guidelines. The department shall submit the propose rules to the joint committee on administrative rules not later than April 1, 1994. Until the rules take effect, the director shall require that the parole guidelines be considered by the parole board in making release decisions. After the rules take effect, the director shall require that the parole board follow the parole guidelines.

And Michigan Compiled Laws, Section 791.233e(6), which provides:

> (6) The parole board may depart from the parole guidelines by denying parole to a prisoner who has a high probability of parole as determined under the parole guidelines or by granting parole to a prisoner who has a low probability of parole as determined under the parole guidelines. A departure under this section shall be for substantial and compelling reasons stated in writing. The parole board shall not use a prisoner's gender, race, ethnicity, alienage, national origin, or religion to depart from the recommended parole guidelines.

STATEMENT OF THE CASE

The petitioners are Michigan prisoners who scored high on the parole guidelines and were denied parole. Their complaint alleged that Michigan statutes enacted in 1992 vest those prisoners who score high on the parole guidelines with a liberty interest in parole. It further alleged that the "substantial and compelling reasons" stated by the parole board members in support of departure from the legislative mandate that they be paroled did not satisfy the criteria established for such departures by the Michigan Legislature. The complaint also alleged that the directors of the department of corrections failed to require the parole board to follow the parole guidelines contrary to the mandate of the Michigan legislature. Having exhausted their administrative remedies, and with no state-law avenue of appeal available, petitioners sued the five parole board members directly involved in denying them parole for monetary, declatory, and injunctive relief; and the other ten respondents for declatory and injunctive relief, under 42 U.S.C. 1983.

The district court dismissed the complaint upon screening -- without analyzing the provisions of MCL 791.233e -- for failure to state a claim upon which relief can be granted based on the theory that the Michigan statutes do not create a liberty interest in parole and that the respondents are entitled to absolute immunity. The court of appeals affirmed the order dismissing the complaint for the reasons stated by the district court.

BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of the Due Process Clause of the Fourteenth Amendment to the

United States Constitution. The district court had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. 1331.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

I. State Law Created Liberty Interests in Parole

A. Conflicts with Decisions of Other Courts

The holding of the courts below that Michigan prisoners who score high on the parole guidelines do not have a liberty interest in parole is directly contrary to the principle of law that state statute may create a liberty interest in parole as established by the Court in Greenholtz v Nebraska Penal Inmates, 442 U.S. 1, 11; 99 S.Ct. 2100, 2106 (1979). In addition, the Michigan Court of Appeals has repeatedly recognized that the parole board can deny parole to Michigan prisoners who score high on the parole guidelines only for substantial and compelling reasons stated in writing. In Re Parole of Johnson, 291 Mich App 595, 601; 556 NW2d 899 (1998); In Re Parole of Scholtz, 213 Mich App 104, 111; 585 NW2d 352 (1998); Killebrew v Dep't of Corrections, 237 Mich App 650, 654; 604 NW2d 646 (1999).

B. Importance of the Question Presented

This case presents a fundamental question of the interpretation of this Court's decision in Greenholtz v Nebraska Penal Inmates, 442 U.S. 1, 11; 99 S.Ct. 2100, 2106 (1979). The question presented in of great importance because it effects the operations of prisons in

all states which have parole statutes implemented by parole boards. In view of the large amount of litigation over parole proceedings, further guidance on the question is also of great importance to the judiciary. In addition, the question is of great importance to prisoners, because it effects their ability to receive both fair, and lawful, decisions in proceedings which may result in months or years of added confinement at a higher security level.

The issue's importance is enhanced by the fact that the lower courts in this case **have completely ignored the applicability of Greenholtz, and the provisions of MCL 791.233e**. This Court held in Greenholtz that a state statute creates a protected liberty interest in parole if it: 1) uses mandatory language to create an entitlement and, 2) collaterally imposes substantive predicates, which limits the parole board's discretion. The Court reiterated this point in Board of Pardon's v Allen, 482 U.S. 369; 107 S.Ct. 2415 (1987), and added that the semantically structure of the any such statute does not alter the result that "[a]ny such statute 'creates the presumption that parole release will be granted.' Greenholtz, supra, at 12, 99 S.Ct. at 2106." Board of Pardons, 482 U.S. at 378; 107 S.Ct. at 2421. The provision of MLC 791.233e satisfy the Greenholtz test in the case of Michigan prisoners who score high on the parole guidelines.

The common sense understanding of "departure" is that it is a deviation from the norm; or in this case a legislative mandate. Under Michigan law, the parole board may "depart" from the parole guidelines by denying parole to a high scoring prisoner only for substantial and compelling reasons. The Michigan Supreme Court has held that "substantial and compelling reasons" is a legal term of art and that when used in a statute: